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SUPREME COURT, U. S.

No. 1014.

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IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES DEAN WALKER,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

On Appeal From the Supreme Court of Arkansas.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner respectfully prays that this Court grant rehearing of its order of April 17, 1967, granting the motion to dismiss the appeal and dismissing the appeal, and also treating the papers whereon the appeal was taken as a petition for a writ of certiorari, denying certiorari. Petitioner prays that his appeal be allowed or that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas.

REASONS FOR GRANTING REHEARING.

Petitioner realizes that it is impossible for the Supreme Court of the United States to review every criminal conviction, even where serious and all too often flagrant breaches of civil rights and liberties have occurred. The scope of this case, however, by the nature of its very ingredients and the wide publicity given it, has become perhaps the most important criminal decision ever appealed from the Arkansas courts. This decision by the Arkansas Supreme Court has become a landmark decision in this state, already threatening to bring about far-reaching innovations in criminal practice. If the Supreme Court of the United States does not review this case, this petitioner, who has been unjustly and unfairly convicted of a crime which in all probability was never committed, is in a position of being required to spend the rest of his natural life in the penitentiary of the State of Arkansas. The floodgate has been opened to similar injustice for hundreds of other criminally accused in this state, who, under the purview of this decision, will be and are being required to submit themselves to the following "Star Chamber" practices approved by the Arkansas Supreme Court in this decision:

1. This decision has upheld the validity of a pretrial criminal discovery act (Ark. Stat. Ann. 43-2010) which gives to the prosecution the unfettered right of pretrial discovery in criminal cases against an accused; and the right of the prosecuting attorney to pilfer and plunder defense counsel files to ferret out incriminating matter and require its production by the accused for use in evidence against him at his trial.

2. This decision winks at the conduct of police officials in suppressing evidence by running off material witnesses, sawing off gun barrels to interfere with defense ballistics

examinations, hiding and concealing from evidence photographs, ballistics reports, fingerprint tests and paraffin tests, favorable or potentially favorable to the accused, and the uncomplimentary behavior in testifying falsely and deceptively to certain essential matters, withholding vital evidence favorable to the accused.

3. However, an accused on the other hand must cooperate with the prosecution, the opinion holds, and cannot suppress evidence in his possession or in the possession of his attorney even though it is incriminating in nature, and must deliver it over to the prosecution and allow the State to pilfer defense files and confiscate any incriminating matter found therein.

4. The opinion holds that a trial judge who has publicly avowed in advance of the accused's trial to "burn the s. o. b. if I can" is a fair and impartial judge—a fact emphasized by the trial judge's attitude in deciding "to baptize the defendant" before he burned him.

5. It is not prejudicial, the opinion holds, for the State's largest daily newspaper to print editorials urging potential jurors at the accused's forthcoming trial to give the accused the death penalty and to settle for nothing less.

If this decision by the Arkansas Supreme Court is allowed to stand, the very concept of a fair trial has been materially altered and the meaning of the term "due process" diluted. The Attorney General of Arkansas strenuously argued in his Motion to Dismiss and Affirm (pp. 2-3) that criminal discovery statutes, such as Ark. Stat. Ann.,§ 43-2010, advanced the cause of criminal justice and that the "prosecution has a right to discover an accused defendant's documents" over the claim of self-incrimination. This case is of far reaching importance, therefore, inasmuch as there needs to be limits set and guidelines established in this important field of criminal discovery. Throughout history the Supreme Court of the United

States has stood as a bulwark, jealously guarding the civil rights and liberties of all citizens regardless of their station in life against any unconstitutional encroachment or inroads. The affirmance of this decision would be a step backwards in criminal jurisprudence. The constitutional prohibition against compulsory self-incrimination would thereby be contaminated and rendered meaningless. The states cannot be permitted to do, under color of a "discovery statute", that which the Constitution prohibits. If this court does not review petitioner's conviction and grant him relief, the State of Arkansas will have convicted him under the following circumstances:

(A) **Trial Judge.**

The trial judge who presided over the trial permitted his personal feelings to become so embroiled that he, in effect, assumed the role of the prosecutor—the chief advocate. He made no effort to conceal his feelings of prejudice from the jury, but in fact exercised every opportunity to manifest his hostility and prejudice towards the accused in the presence of the jury. That the days of the "hanging judge" are not over can be seen in the following instance which appeared in the record.

Defendant moved that the trial judge disqualify himself because of personal feelings about the case and because he had on prior occasions made highly prejudicial statements showing hostility toward defendant (T. 80). Upon this motion the petitioner offered the testimony of Rev. Ray Branscum and two other witnesses (T. 83-92), who testified that the trial judge had made statements in their presence that "he intended to burn the S. O. B." (referring to the accused) "if he could". To this the judge replied:

> "* * * It is not up to me to burn him or punish him. If it was, we wouldn't have to have this trial" (T. 85-86).

The judge, after hearing this testimony, overruled defendant's motion for disqualification and stated, ". . . I think I can give him a fair trial, the Supreme Court can reverse me. They have reversed me once before when I thought I was right. I don't think my personal feelings have anything to do with it one way or the other" (T. 93).

The trial judge's treatment of defendant's counsel was one of disrespect, a means of conveying to the jury how he felt about the case. The constant ridiculing, belittling, and interruptions can be read between the lines of many pages of the trial transcript. In some places you don't even have to read between the lines. For instance:

> "Mr. Worsham: Also, if the court please, I wish to complain about the tone of the court's voice when he addresses counsel before the jury.
>
> The Court: I can't control that, I'm sorry.
>
> Mr. Worsham: And the demeanor of the court toward counsel for the defense in the presence of the jury. It is very prejudicial and when coupled with the comments and various inflections he places on his words, it places counsel in a very awkward position" (T. 294).

Instances of the judge's comments are grouped together in the appellant's brief before the Supreme Court of Arkansas, which is attached to the record. They are found at pages 143 to 160 of that brief.

The record reflects many dozens of improvident comments by the trial jurist and many instances of his verbal abuse of defense counsel, both within and without the presence of the jury. The record is filled with his constant belittlement of defense counsel (T. 290-292; 300; 392; 417; 829; 1167; 293-294), suggesting that "they were asking ridiculous questions" (T. 300, 417, 636, 780, 842), "making ridiculous objections" (T. 636); "stalling around trying

to kill time so that defendants could get their witnesses here" (T. 570, 572); "costing the state unnecessary money" (T. 428, 829, 851); suggesting in the presence of the jury that defense's expert had tampered with the ballistics evidence (T. 776-777); asking defense counsel "is there anything else that (he) can think of that the prosecutor has lied about" (T. 882); expressing undue and unnecessary impatience with defense counsel in making objections, and in denying at least a thirty-minute recess (T. 570-572, 636); and expressing surprise and ridicule to the jury at defense counsel's offer to waive the oath when calling the prosecuting attorney as a witness, and twice telling the jury that defendant had previously been found guilty and convicted of first degree murder by the previous jury for this same offense (T. 148; 334), suggesting that their task on the "retrial" was but a mere formality to carry out a technicality.

The conduct of the trial judge was argued before the Supreme Court of Arkansas and fell on deaf ears. In the petition for rehearing before the State Supreme Court, we said, "The record in this case would probably shock the United States Supreme Court, it should have shocked the Arkansas Supreme Court." We suspect that the Supreme Court of Arkansas is surprised that the Supreme Court of the United States was not shocked, and refused to review the case.

(B) **The Newspapers.**

The petitioner was accused of killing a policeman; this is the exceptional type of case where the forces of the State, the public, and the press, were clamoring for blood. There was, as a practical matter, no way for petitioner to get a fair trial in Pulaski County, Arkansas. This can readily be seen by the pretrial publicity, petitioner being the **cause celebre** of Little Rock, Arkansas which through the years has suffered a dearth of sensational crime.

It was so bad that the editorial page of a very liberal newspaper, the **Arkansas Gazette**, got into the act, but unlike most liberal newspapers, adopted the position of a prosecutor. Note this editorial (T. 18-19):

> "James Dean Walker now has a new lawyer and is awaiting a new trial.
>
> The trial was ordered by the state Supreme Court because of a procedural error in its predecessor—in which the jury convicted Walker of first-degree murder in the killing of a North Little Rock policeman and sentenced him to die in the electric chair. The North Little Rock Times reports that Walker's defense this time around is being financed by a group of Christian laymen opposed to the death penalty.
>
> • • •
>
> We do think killing a policeman an especially repugnant crime for which especially harsh penalties are in order. An attack on an officer of the law is an attack on the law itself, and is therefore an attack on the whole fabric of social order.
>
> The point which seems to us worth making is that the way the Arkansas remission and probation system now is operated it is impossible to put away any sort of a felon—cop killers and mutilators of little children included—with any assurance that confinement will last longer than eight years. No matter how heinous the offense, there is an excellent chance that the governor will reduce the sentence and that the Parole Board the governor appoints will then release the offender.
>
> This is, it seems to us, an almost insuperable barrier to abolition of the death penalty, or even to sensible consideration of abolition of the death penalty. It is, surely, one reason Arkansas juries do not incline to avoid the death penalty. They know that they must choose between putting a criminal out of circula-

> tion permanently—by taking his life—and putting him out of circulation for eight years or so, by decreeing a life sentence. One needn't favor taking of a life for a life to incline toward the death penalty for especially dangerous criminals under those ground rules."

Sixteen other inflammatory articles are in the record in this case (T. 859-861).

The fact that a Pulaski County jury would find petitioner guilty was a foregone conclusion; defense counsel knew they were battling against hope; the only miracle in the whole case is the fact that the jury did not choose the death penalty called for by the newspapers.

(C) **Prosecuting Attorney.**

The Prosecuting Attorney wanted the private ballistic report prepared by petitioner's expert witness, so pursuant to the Arkansas Criminal Discovery Statute—Ark. Stat. Ann., § 43-2010—he moved the trial court to order the defense counsel to produce said report from their defense files. The defense objected strongly to this, but the trial judge ordered the defense to produce this report. The findings in the ballistic report were inconclusive, but contained matters incriminating to the petitioner, e. g., it was found that the class characteristics between the alleged murder weapon and the fatal bullet were identical (T. 48). Contrary to the law, the Prosecuting Attorney was allowed to delve into the defense counsel's files.

(D) **The Police.**

The petitioner was accused of killing a policeman, and the police in preparing the case did an excellent job for the Prosecuting Attorney—a little too excellent for those of us who prefer due process in criminal matters. This conduct of the police is understandable, a brother police

officer was killed seemingly by petitioner, but their suppression of evidence cannot be excused.

There was much gunplay at the scene, and the defense theory was that Officer Barrentine, a fellow officer of the decedent, had accidentally shot the deceased officer, Officer Vaughan, or that he was struck by a ricochet bullet from the Barrentine gun. Officer Barrentine testified at the time of the incident his gun had a four-inch barrel. However, when it came time for a ballistics test by the defense expert, it was found that Officer Barrentine's gun had had two inches cut off the barrel, making it impossible for the defense to perform a ballistic test to determine whether or not it was the lethal weapon (T. 667). Also, on cross-examination of Officer Barrentine (T. 667-668) it was developed that he had at the first trial of petitioner falsely testified concerning his shooting the petitioner five times after his partner was killed—when in truth and in fact the decedent, Officer Vaughan, had fired five bullets into petitioner's body before he was killed. Officer Vaughan, the deceased, was shot only once, and directly in the heart, and died instantly. Therefore, the deceased shot and wounded the petitioner five times before the fatal shot was ever fired.

At the second trial defense counsel tried to pierce the fog and show that Officer Vaughan had fired first and emptied five shots into petitioner, rendering him unconscious, and that Officer Barrentine had not only sawed off his gun barrel to prevent a defense ballistic test but gave knowingly false and deceptive testimony at the first trial.

Another good indication of what the police have done is seen in regard to the testimony of Mary Louise Roberts and Linda Ford, who were at the scene of the shooting. They were called as witnesses by the prosecution at the first trial, and their testimony was extremely favorable

to the prosecution. They were, in fact, the only witnesses who claimed to have seen the petitioner fire at the deceased. At the second trial, the prosecution claimed they were unavailable, so the trial judge, over the defense objections, allowed the prosecuting attorney to read an unauthenticated transcript of their purported testimony at the first trial. After the trial, and too late for use therein, defense counsel managed to find Mary Louise Roberts. Her sworn statement given before a court reporter is in the record as an exhibit to the petition for rehearing before the Supreme Court of Arkansas, and is a part of this record on appeal.

The witness, Mary Roberts, relates at pages 4, 5 and 6 of her statement the manner in which she became "unavailable" for the second trial. The deputy sheriff came to her home approximately one week before the trial and advised her that he had a subpoena for her and would be back later that evening to serve the subpoena. Prior to this a North Little Rock police officer had advised her that they were getting ready to retry the accused and asked her if she wanted to be here for the trial (p. 6). This officer, whom she had been dating, had agreed earlier to tip her off when the trial date arrived so she could leave town (p. 7). The witness describes at pages 7-12 of her statement that she had previously informed certain North Little Rock police officers that if called as a witness again her testimony would be unfavorable to the prosecution. She did not immediately leave and a detective on the North Little Rock Police Department came across the river to Little Rock to her room at the Rose Motel and "advised" her to leave town. She was slow in leaving, and the officer came a second time to the motel and through menacement of jailing induced her to leave town—she was first arrested, then released to leave town. At pages 18-26 the witness gives a full account of the events occurring at the scene of the alleged killing sub-

stantially in accord with what purports to be her former testimony, excepting the fact she, like the absentminded Officer Barrentine, added certain facts previously omitted and suppressed from her purported testimony at the former trial. This witness stated (p. 21) that deceased Officer Vaughan opened the front door of the Oldsmobile. She didn't hear the conversation, but Walker bent over and started to reach under the seat. The witness stated (pp. 22-24) that Officer Vaughan had his gun in his hand when he opened the door and when Walker bent over Officer Vaughan pulled the trigger and started firing. She never did see Walker with a gun in his hand, or see him fire a shot (pp. 22, 23). Five or six shots were fired before Officer Vaughan was shot (p. 24). He screamed when he was shot. At page 23 of her statement the witness says that as soon as Walker was shot he slumped over in the seat. She never did see him raise a gun to fire at Officer Vaughan, nor see him fire a shot. Walker slumped when the first shot was fired. Officer Vaughan fired first (p. 24). The witness states definitely and with certainty, page 26 of her statement, that the appellant Walker, who was found unconscious holding a fully-loaded gun, never fired a shot. The witness states at page 28 of her statement that she does not know how the empty gun found at the scene got under Walker, but she observed a police officer standing over the unconscious defendant emptying shells out of a gun into the palm of his hand and replacing shells back in it. At the time of the last trial Linda Ford was staying in the Pine Bluff Motel at Pine Bluff, Arkansas.

This statement by the witness Mary Louise Roberts describes a course of conduct by the prosecution and agencies of government substantially the same caliber as pursued all the way through. From the beginning this has been a case of missing gun barrels, missing witnesses, missing ballistics reports, missing photographs, missing

fingerprints and paraffin tests, missing shell hulls, and amnesia-stricken witnesses.

As we have said before we can understand the feelings of the police in the matter of the killing of a fellow officer, and in fact would be surprised if the police had conducted themselves in any other manner, but still this does not make for due process in criminal matters. Petitioner was found unconscious at the scene with five bullets in him (T. 683-871). It would have been much easier for the police to have finished the job there, rather than wait until his trial and try to finish him nunc pro tunc.

The conduct of the police in suppressing evidence is understandable, but not excusable.

THE QUESTIONS PRESENTED WERE SUBSTANTIAL.

(A) Discovery in Criminal Cases.

In this day of the developing police state, e. g., wiretaps, the microphones in the martini olives, truth drugs, etc., it would be beneficial to society to know how far the Criminal Discovery Statutes such as Ark. Stat. Ann. § 43-2010 apply, i. e., how far may the State delve into the defense counsel's files and work product. That is what was done in the present case, the defense counsel being compelled by court order to turn over ballistic reports on the alleged murder weapon prepared by the defense ballistics expert, despite protests of self-incrimination.

With the promulgation of the Federal Rules of Civil Procedure in regard to discovery and their adoption by states like Arkansas, there has come to be an increased interest in and use of discovery in civil actions, and this has caused a similar interest in the use of discovery in criminal matters. The Federal Rules of Criminal Proce-

dure has discovery provisions as do the statutes of Arkansas and other states. Criminal discovery is taking on new importance in modern law.

The Supreme Court of the United States, although setting down guide lines in civil discovery, **Hickman v. Taylor**, 329 U. S. 495, has neglected guide lines in the more important field of criminal discovery.

There needs to be limits set and guide lines established on the use of discovery in criminal cases, as was done in the area of confession in **Miranda**. See also **Ross v. Sirica**, .., F. 2d ... (D. C. Cir., No. 20535, Jan. 23, 1967) advance copy of meritorious opinion dealing with currently volatile subject of Pretrial Discovery in Criminal Cases.

Petitioner raises a question of substantial importance, which could benefit society in that it would know how far a prosecution could go into the defense's case and files and dig out the papers and exhibits it wants, and when does a plea of self-incrimination and of attorney-client confidences close these files?

At first blush it does not seem as spectacular a question as wiretaps and confessions, but it is just as important, and unless some limits are set, petitioner and others will find themselves in prison because the question of criminal discovery procedures did not arouse the interest of the Court.

(B) **Prejudice of Trial Judge.**

Although there does not need to be a pronouncement by the Supreme Court of the United States that prejudice of a trial judge does not make for due process in criminal trials, petitioner should not have to spend time in prison as the result of a trial by a prejudicial trial judge, but rather the Supreme Court should take the case and pronounce that such a trial will not be tolerated and that

the days of the "hanging judges" went out with the taming of the Wild West.

Petitioner deserved a trial by a jury of twelve; he did not want a thirteenth member, the trial judge, on the jury. The thirteenth rendered his case unlucky.

It does not make sense for the United States Supreme Court to decline to take this case, and thus compel us to futilely pursue post-conviction remedies in the court of this hostile trial judge.

(C) **Comment on Result of Former Trial.**

The trial judge, not once but twice, informed the jury that there had been a previous trial, a conviction, and a reversal (T. 147-149, 331-335). The defense strongly objected to this.

It is doubtful that this had any effect on the jury, for with the tremendous newspaper coverage surrounding this case, anyone in Pulaski County, Arkansas, would have known this. However, it does show the attempts by the trial judge to nail the lid down on petitioner's coffin; evidently he missed the nail with the first comment, so he made the second.

There needs to be a pronouncement by the Supreme Court on how far a trial judge may go in using the results of a former trial to clobber a criminal defendant.

(D) **Pretrial Publicity.**

Although the Court in **Sheppard v. Maxwell**, 86 S. Ct. 1507, and **Irwin v. Dowd**, 81 S. Ct. 1639, has covered the law on pretrial publicity, some states such as Arkansas have not gotten the message. The editorial of the **Arkansas Gazette**, quoted *supra*, surpasses anything in those two cases. Petitioner asks that the Court take his case,

so states such as Arkansas will understand that the Court meant what it said in **Sheppard v. Maxwell** and **Irwin v. Dowd.**

(E) **Suppression of Evidence.**

That suppression of evidence violates due process is so obvious as to not need a pronouncement by the Supreme Court of the United States. It might be helpful for the police to know that this rule applies in ever criminal case including the killing of a policeman.

Suppression of evidence by the police cannot and will not be ended no matter how many cases the Supreme Court of the United States reverses on that point. However, each reversal and each time the hands of the police are slapped will make the police think twice before they slip something under the rug or advise a material witness that the weather is better elsewhere.

CONCLUSION.

Petitioner asks that you review his conviction either by appeal or by writ of certiorari, and not relegate him to a futile and lengthy pursuit of post-conviction remedies. Under Crimial Procedure Rule No. 1 of the Arkansas Supreme Court, petitioner must ask for a hearing before the same trial judge, and then appeal to the Supreme Court of Arkansas. Petitioner will then have to come to the Supreme Court of the United States again in a new proceeding before he can file for habeas corpus in Federal District Court. In the meantime petitioner would be required to spend perhaps years in the Arkansas State Penitentiary while trying to right the wrongs committed during the course of this trial. The accused is a pauper and, as the record shows, his attorneys are not only serving without fee, but during the last trial and these ensuing appeals are having to personally bear all

trial expenses, transcript costs, all brief printing costs, and other expenses. Regardless of how deserving the cause, counsel cannot continue endlessly in their service to an indigent client.

Petitioner asks for justice now, and that this honorable Court please grant him shelter to escape a biased tribunal, and grant to him the relief to which he is entitled.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Fletcher Jackson.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WALKER *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 1014. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.